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SUPREME COURT, U.S.

NO. 81-5189

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, TERM, 1981

GEORGE MERCER,

Petitioner,

V.

STATE OF MISSOURI,

Respondent.

PROCEEDINGS ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

I.

The Missouri Supreme Court did not decide a federal question in a way in conflict with the applicable decisions of this Court when it affirmed the decision of the trial court to strike for cause certain venirepersons who could not consider imposing the death penalty under any set of circumstances, because the Missouri courts utilized the correct standard to determine who should be excluded as stated in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 E.Ed.2d 776 (1978), and because the Missouri Supreme Court applied, in a logical manner, traditionally accepted principles in reviewing the trial court's decision as to whether or not the venirepersons stated their positions in a sufficiently clear and unequivocal manner.

II.

The Missouri Supreme Court did not decide a federal question in a way in conflict with the applicable decisions of this Court when it affirmed the trial court's refusal to find that the jury in the instant case was chosen in conflict with the requirement of the Sixth Amendment, that the method by which the jury panel was chosen did not exclude an identifiable segment of the community, because this Court has already decided the question in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), to the effect that excluding venirepersons who cannot impose the death penalty under any set of circumstances in capital cases does not deny a defendant his right to have a jury chosen from a cross-section of the community; and, because there were no facts developed in the state courts to show that the excluded venirepersons belonged to an identifiable group within the community of the trial and that the group was under-represented in the jury selection process.

III.

The Missouri Supreme Court did not decide a federal question in a way in conflict with the applicable decisions of this Court when it found that the facts of this case put it at the "core" of those cases covered by the language of the "depravity of mind" aggravated circumstance found in § 565.012.2(7), RSMo 1978, because the Missouri Supreme Court followed the analysis of this Court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), in that the Missouri court specified exactly why this case fell within the criteria of that aggravating circumstance, identified the facts of the case supporting this finding and compared this case to other Missouri capital cases. As to the petitioner's challenge to the aggravating circumstance contained in § 565.012.2(6) as mentioned in his third Question Presented, this Court should not review the issue because the petitioner did not raise it in state court nor does he develop the point with any argument contained in the petition for writ of certorari filed in this Court.

ARGUMENT

I.

Petitioner complains that the Supreme Court of Missouri should not have upheld the striking for cause of five venirepersons during the voir dire proceedings. Petitioner claims that the Missouri court gave an unwarranted interpretation to the voir dire persons' answers in that the court found the answers were unmistakably clear as to the voir dire persons' unwillingness to impose the death penalty under any circumstances. Petitioner contends that the answers were ambiguous. Petitioner makes no claim that the Missouri court formulated an incorrect standard by which to measure the voirdire persons' commitment against the death penalty but complains only of the unwarranted significance given to their answers.

Respondent contends that the writ of certorari should not issue because the Missouri courts have not decided "a federal question in a way in conflict with applicable decisions of this Court." Rule 17.1(c), Supreme Court Rules. This particular issue presents no application of an erroneous principle nor does it present a situation of an incorrect application of a proper principle. The Missouri courts used all the traditionally accepted means of evaluating the clarity of the answers and of reviewing the trial court's initial decisions in these matters. Whether or not the answer was unequivocal involves a matter of judgment to which there can always be some measure of dispute. Given the fact that the Supreme Court of Missouri made a rational application of correct principles in reviewing the trial court's action, no writ should issue to review this question.

As the opinion issued by the Missouri Supreme Court shows, it correctly recognized the standard to be used in judging whether or not jurors can be stricken for cause because they are unwilling to consider assessing the death penalty no matter what the circumstances may be. State of Missouri v. George C. Mercer, No. 61797 (Mo. banc May 11, 1981), at pages 7-8 (Petition Appendix C). In finding that the answers were sufficiently unequivocal to meet

the standards set out in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the court based its judgment on several factors: (1) the trial court's understanding of the Witherspoon issue; (2) the trial court's observation of the demeanor of the participants in the voir dire examination; (3) the fact that lay people have a difficult time expressing themselves with clarity concerning complex questions; and, (4) the Supreme Court's own review of the record. See page 8 of the Mercer slip opinion. As the following discussion will show, these factors are acceptable means by which courts review such questions and were applied logically by the Supreme Court in this case.

In regard to the first factor, the trial court's professed understanding of the Witherspoon issue is an important factor to show the correct application of the rule. See Darden v. Wainwright, 513 F.Supp. 947, 959 (M.D.Fla. 1981). At the trial of the instant case, the judge and parties agreed after some discussion on the principle that a venireperson could not be excluded unless that person was "irrevocably committed to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the trial, . . .". As the examinations of the disputed voir dire persons' show (attached as an appendix to the Petition in the instant case), all voir dire people were asked the proper questions under Witherspoon.

The Supreme Court's reliance on the trial court's ability to observe the demeanor of the participants in the questioning is a traditionally accepted method to determine the correctness of a trial court's rulings. In order for a venireperson to be properly excused for unwillingness to consider the death penalty under any circumstances, that person's answer must be "unmistakably clear" in that regard. Although this perhaps requires more certainty than do answers in non-capital cases to questions concerning the ability of the jurors to follow the law, no court has ever held that the standard of appellate review of the trial court's decision cannot take into consideration the fact that the

trial court observed the demeanor of the participants in the questioning in order to indicate the correctness of the trial court's ruling in death penalty cases. There has never been any requirement that the certainty of the voir dire person concerning the Witherspoon issue be able to be determined solely on a cold record without regard to the context of the answer and the demeanor of the person answering the questions.

The principle that courts of review may give considerable deference to trial court determinations in issues regarding strikes for cause is well ingrained not only in Missouri law but also in federal appellate law.

> "There are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than in ruling on challenges for cause in the empanelling of a jury." United States v. Ploof, 464 F.2d 116, 118, n. 4 (2nd Cir. 1972), as quoted in United States v. Gullion, 575 F.2d 26, 29 (1st. Cir. 1978).

Accord, United States v. Sutton, 446 F.2d 916, 923 (9th Cir. 1971); cert. denied, 404 U.S. 1025 (1972). All of these are non-capital cases.

This principle has been based on the fact that the trial court is in the best position to judge the effect of statements and the sincerity of a juror's comments. United States v. Gibbons, 607 F.2d 1320, 1330 (10th Cir. 1979); Government of Virgin Islands v. Gereau, 502 F.2d 914, 934 (3rd Cir. 1974); cert. denied, 420 U.S. 909 (1975); and, United States v. Ploof, supra, at 118.

Words such as "I don't think" and "I believe" may be very emphatically stated and indicate a firm and unwavering belief. They do not necessarily express equivocation. Tone of voice, facial expressions, and the context of the questioning all play a great part in determining the meaning of such words. These principles were inferentially recognized by this Court in its handling of the cases of Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969), and Maxwell v. Bishop, 398

U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970). This Court reviewed the allegations that venirepersons were excused for cause in a death penalty case even though they had not stated unequivocally that they would not inflict the death penalty under any circumstances. The trials had taken place before the holding of Witherspoon. This Court expressed grave doubts about the equivocal nature of certain answers given by venirepersons but refused to make a final determination or to vacate the death penalty on that basis. Because this Court was the first court in which the allegations were brought up, the cases were remanded to the federal district court to permit a further record to be made. This Court recognized that other facts might modify the conclusions which this Court felt impelled to reach concerning the voir dire examinations. Boulden v. Holman, supra, 394 U.S. at 483-484; Maxwell v. Bishop, supra, 398 U.S. at 266-267.

It should be recognized that lay people are not used to expressing their deeply held beliefs in the formal and rather antagonistic atmosphere of a courtroom in a cogent and emphatic manner which comports with the principles of clarity demanded of courts and lawyers. State v. Pride, 567 S.W.2d 426 (Mo.App., St.L.D. 1978). There has never been a formalistic dialogue required by any court to indicate the venireperson's irrevocable commitment against the death penalty. For example, in Boulden v. Holman, supra, one of the venire examinations that this court indicated showed the type of irrevocable commitment that would sustain the challenge of cause contained the word "think" in the question which the trial court asked of the venireperson. "You think you would never be able to inflict the death penalty in any type of case?" "Yes, sir." [Emphasis added.] Boulden v. Holman, supra, 394 U.S. at 482, n. 6. If the word "think" does not necessarily raise an idea of equivocation when used in a question, then inferentially it would not do so in an answer. State v. Elliott, 267 N.E.2d 806, 808 (Ohio 1971), death sentence vactaed on other grounds, 408 U.S. 938 (1972).

In regard to the third factor relied on by the Supreme Court, it is clear to anyone who has tried cases, either as an advocate or sitting as a judge, that the courtroom presents an intimidating atmosphere for lay people, especially when they are being questioned out of the presence of the rest of the voir dire panel as was the case in petitioner's voir dire proceedings. This practical experience prompted the Missouri courts some time ago to recognize that people employ popular idioms more often than words of legal percision when describing feelings about religious or philosophical beliefs. As was held in State v. Pride, 567 S.W.2d 426, 433 (Mo.App., St.L.D. 1978):

> "As much as judges and lawyers might desire it, people generally do not speak in absolutes, probably because they realize that few things are ever absolute."

The court in that case recognized that the idiom "I don't really think so" is a common vernacular expression which does not necessarily signify equivocation.

The Missouri Supreme Court's recognition of this and its taking this factor into consideration was a proper and rational method of analysis and needs no review by this Court.

In regard to the fourth factor in the Missouri Supreme Court's analysis, its own review of the record, this shows that the court did not simply abdicate its responsibility by deferring completely to the trial court. The court relied on the record and circumstances revealed therein as well as the collective practical experience of the majority of judges in regard to voir dire examination. As was said before, a decision interpreting another person's words requires judgment and is the type of decision in which there is always some room for argument.

An additional factor tending to indicate, although not determinative, of the clearness of the voir dire persons' answers to the Witherspoon questions is the action taken by petitioner's attorney who was present during the questioning. The circumstances

show that counsel understood the venirepersons whose excusal is now in dispute to be unequivocal in their irrevocable opposition to the death penalty. During the voir dire, appellant did not challenge the strikes for cause on the ground of equivocation. The ground stated at the voir dire was the separate and distinct ground that petitioner was denied his Sixth and Fourteenth Amendment rights to a cross-section of the community because people who were irrevocably committed to not inflicting the death penalty were being excluded from serving on the jury. There was no claim during voir dire that the disputed venirepersons were not certain enough about their answers on the death penalty. A necessary part of the Sixth Amendment objection is that the excluded individuals form an identifiable segment of the community. See, Duren v. Missouri, 439 U.S. 357, 995 S.Ct. 664, 58 L.Ed.2d 579 (1979). The very nature of this objection has as its factual premise the fact that the juror is irrevocably committed to not inflicting the death penalty under any circumstances. Otherwise, there could be no ground to claim that he belongs to this excluded segment of the community. Since petitioner raised that objection but did not raise an objection on the ground of equivocation, it is obvious that he understood the venirepersons' answers to be clear and unequivocal in their opposition to the infliction of the death penalty. Having made the decision at the trial level that there was no ground to object to the definiteness of the answers, petitioner's claim of equivocation should be weighed accordingly.

In conclusion, the issue raised by petitioner concerning the Witherspoon issue should not be the basis of the issuance of this Court's writ of certiorari since it involves no substantial federal question which has been decided contrary to any opinion by this Court. It was a matter of judgment as to whether the answers were equivocal and that judgment was exercised in a sound and rational manner by the Supreme Court of Missouri and by the trial court.

II.

Petitioner raises the question of whether or not the exclusion of venirepersons who have been disqualified properly under the principles of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), deprives petitioner of a jury comprised of a fair cross-section of the community as guaranteed by the Sixth Amendment and as interpreted by such cases as Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), and Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). This is the only issue raised in the second Question Presented by petitioner. In the Missouri Supreme Court, petitioner raised this issue as well as a second issue concerning whether or not he had been deprived of an impartial jury under the Fourteenth Amendment due process clause by means of the Witherspoon exclusion leaving on the jury only those persons who were more prone to find petitioner guilty than were those who had been excluded. These are separate and distinct issues as seen by the analyses in Spinkellink v. Wainwright, 578 F.2d 582, 593-597 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979), and People v. Henderson, 145 Cal.Rptr. 751, 758-759 (Cal.App. 1978), and Hovey v. Superior Court, 616 P.2d 1301, 1310, n. 45 (Cal. 1980). Since petitioner has not included this latter issue in his Question Presented, it is not before this Court for consideration and will not be addressed by respondent. Rule 21.1(a), Supreme Court Rules.

In regard to the Sixth Amendment cross-section argument, respondent asserts that under the provisions of Rule 17.1(b) and (c) no writ of certorari should be granted because this Court has already ruled that exclusion under the principles of Witherspoon is not violative of the Sixth Amendment. That precise issue is addressed in Lockett v. Ohio, 438 U.S. 586, 596-597, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), wherein the court held that Taylor v. Louisiana, supra, does not suggest "that the right to a representative jury includes the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the

trial judge." Other courts have been in agreement. People v. Henderson, supra, 145 Cal.Rptr. at 758-759, State v. Avery, 261 S.E.2d 803, 810 (N.C. 1980). Compare, Grigsby v. Mabry, 483 F.Supp. 1372, 1385 (E.D.Ark. 1980), rev'd on other grounds, 637 F.2d 525 (8th Cir. 1980), interpreting Witherspoon v. Illinois, supra, to hold that there is no violation of the cross-section requirement of the Sixth Amendment even if the disputed jurors are excluded at the guilt phase as opposed to the sentencing phase and also holding that such venirepersons do not constitute a "distinctive" group within the community.

A further reason not to consider the cross-section issue by means of issuance of the writ of certorari is that there was no factual basis developed in state court on which to base a decision concerning whether there was a distinct group of the community under-represented on the jury panel.[1] In order to establish the claim that petitioner has been deprived of a fair cross-section of the community, he must demonstrate (1)that the group is a "distinctive" group in the community, and (2) the representation of the group in venire panels from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) that this under-representation is due to systematic exclusion of the group in the jury selection process. Duren v. Missouri, supra, 439 U.S. at 364.

As for the first factor in the Duren test, whether the group claimed to be excluded is one identifiable within the community, the petitioner must show that such people are "sufficiently numerous and distinct" within the community of the trial (in this case Greene County, Missouri). Taylor v. Louisiana, supra, 419 U.S. at 531; and Duren v. Missouri, supra, 439 U.S. at 364, 370. In the instant case, petitioner presented nothing to the trial court or to the Supreme Court of Missouri concerning the size of this group within Greene County and the group's distinctive qualities. As recognized by the United States Supreme Court,

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1. The only juror who indicated that, once petitioner was found guilty of capital murder, he would consider only the death penalty, was also striken for cause.

"communities differ at different times and places. What is a fair cross-section at one time or place is not necessarily a cross-section at another time or different place." Taylor v. Louisiana, supra, 419 U.S. at 537.

As to Duren's second factor, whether the group has been under-represented, petitioner fails for the same reason as given immediately above. There are no statistics to show what percentage of the community of Greene County constitutes a group of people who would be so unalterably opposed to the death penalty that they could not give it fair consideration under the law or the instructions of a court. Without such information, it is impossible to conclude whether having kept this group off the jury in this case represents a statistical under-representation of that group in the community. It is entirely possible that, for instance, less than one percent of the people in Greene County feel that way. Whatever speculation we wish to engage in, a ruling on this type of allegation must be made on facts, and there are no facts, or trial "ruling" upon such evidence, for this court to review. Tacon v. Arizona, 410 U.S. 351, 352, 93 S.Ct. 998, 35 L.Ed.2d 346 (1973).

III.

Petitioner claims that the Missouri Supreme Court gave an overbroad construction to the language of § 565.012.2(6) and (7), RSMo 1978, which contained the two aggravating circumstances on which the death penalty was based in this case. Respondent submits that the writ of certorari should not be granted because the Missouri Supreme Court followed the dictates of this Court in regard to § 565.012.2(7) ("outrageously or wantonly vile") and because there was no argument presented challenging the construction of § 565.012.2(6) (petitioner acting as an agent of another) either to the Missouri Supreme Court or to this Court.

In regard to the aggravated circumstance contained in paragraph 7, petitioner's attack is premised on the assertion that the "wantonly vile" factor has been formulated practically the same in both the Georgia and Missouri statutes and on the assertion that the this Court and the Georgia Supreme Court have held that the language of Georgia's statute is unconstitutionally broad. See Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), and Holton v. State, 253 S.E.2d 736 (Ga. 1979), cert. denied 100 S.Ct. 263 (1979).

The Supreme Court of Missouri interpreted Godfrey as upholding death penalties which are based on the "wantonly vile" aggravated circumstance as it is worded in the Georgia statute as long as the state courts construe each case to make certain that the death peanlty is being imposed only in those cases which lie at the very "core" of the situations encompassed by that aggravated circumstance. See pages 13-14, n. 4 of State v. Mercer, slip opinion. This position is supported by this Court's opinions in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and Godfrey. In Gregg the United States Supreme Court specifically rejected a challenge to the language in the Georgia statute on grounds of facial vagueness and stated as follows:

"It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction. In only one case has it upheld a jury's decision to sentence a defendant to death when the only statutory aggravating circumstance found was that of [§ 27-2534.1(b)(7)], see McCorquodale v. State, 233 Ga 369, 211 S.E.2d 577 1974), and that homicide was a horrifying torture-murder [footnotes omitted]." Gregg v. Georgia, supra, 428 U.S. at 201.

See also Proffitt v. Florida, 428 U.S. 242, 255-256, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), wherein similar statutory language was also upheld. In cases following the Gregg decision, the Georgia Supreme Court further analyzed and discussed this aggravating circumstance, and death sentences imposed thereon were upheld. See Blake v. State, 236 S.E.2d 637, 642-643 (Ga. 1977), cert. denied, 434 U.S. 960 (1977); Harris v. State, 230 S.E.2d 1, 10-11 (Ga. 1976), cert. denied 431 U.S. 933 (1977).

In Godfrey v. Georgia, supra, the United States Supreme Court reiterated its holding in Gregg that the Georgia provision was not facially unconstitutional, and then stated that:

"The issue now before us is whether, in affirming the imposition of the sentences of death in the present case, the Georgia Supreme Court has adopted such a broad and vague construction of the § (b)(7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the United States Constitution." [Emphasis supplied; footnote omitted.] Id. 446 U.S. at 423.

In short, the issue before the court was not whether the aggravating circumstance at issue was void for vagueness on its face, but whether it was vague as applied to the facts and circumstances of that case. The court examined the facts surrounding the petitioner's murder of his wife and mother-in-law and concluded not only that this killing did not come under a constitutional definition of the aggravating provision but that also "[t]he circumstances of this case . . . do not satisfy the criteria laid out . . . in the Harris and Blake cases [cited supra]." Id. 446 U.S. at 432. The reversal was based on the failure of the Georgia Supreme Court to follow its own criteria.

In the short time since this Court's decision in Godfrey, this Court has denied certiorari on at least two death sentences based on the section (b)(7) aggravating circumstance. Berger v. State, 265 S.E.2d 796 (Ga. 1980), cert. denied 100 S.Ct. 2975 (1980); and Blake v. State, 260 S.E.2d 876 (Ga. 1979), cert. denied 100 S.Ct. 2974 (1980). See also Rutledge v. State, 374 So.2d 975 (Fla. 1979), cert. denied 100 S.Ct. 1844 (1980); Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert. denied 100 S.Ct. 3000 (1980). Given these facts, it is preposterous to assert that the United States Supreme Court has declared the Georgia aggravating circumstance in question to be facially void for vagueness as formulated in the Georgia statute, or that the equivalent Missouri statutory provision is invalid on this ground.

After recognizing the fact that it was required to construe the language in Missouri's statute which sets out the "wantonly vile" aggravating circumstance, the Missouri Supreme Court proceeded to specify exactly what aspects of the case put it at the "core" of that aggravating circumstance, detailed the facts supporting this aspect of the case and compared it to other Missouri cases. See pages 15-16 of slip opinion.

> "'Depravity of mind' is demonstrated in this case by the mode of killing preceded by extented sexual and psychological abuse of the victim. See

Hance v. State, 245 Ga. 856, 268 S.E.2d 339, 345-346 (1980), cert. denied 49 U.S.L.W. 3443 (Dec. 16, 1980)." Page 15 of slip opinion.

In the instant case, the facts show a vile crime growing out of an obviously depraved mind. At the point of a shotgun, petitioner forced the victim, who with petitioner's connivance had been lured to his house on the pretext of a date with another person, to have sex with him. The victim was a birthday present to the petitioner. She was then apparently subjected to a rape by Steven Gardner who had accompanied her to the house as her date. She was forced to perform fellatio on David Gee while the event was being witnessed by other men, including petitioner. Then according to petitioner's statements made at the time, he intended to have anal sex with her. Before going upstairs to the bedroom he asked Steven Gardner what Gardner wanted done with her, and was told by Gardner to kill her. Petitioner said he would do so. The victim was killed, slowly, by choking. She was killed not only because Steven Gardner asked petitioner to do it but also in order to prevent criminal charges from being brought against petitioner. This victim was not just murdered, but was subjected to one of the worst degradations that a man can inflict upon a woman, forcing sex upon her by himself and others. Petitioner not only forced sex upon her but made a spectator sport out of it. She was subjected not only to sexual intercourse, but also to oral sodomy and, apparently, anal sodomy. She was killed strictly for the convenience of Steven Gardner and petitioner so that their deeds would never come to light.

Petitioner's reliance on Holton, supra, to show that Georgia courts have recognized that the language in the "wanton vile" aggravated circumstance is fatal to a death penalty assessment based on that aggravating circumstance is misplaced. In that case, the Georgia court held that the death penalty should be vacated because the instruction submitting that aggravating circumstance to the jury was not complete enough in that it stated only that death could be imposed "by reason of depravity of mind". The death penalty was reversed because the instruction

omitted all reference to "outrageously or wantonly vile, horrible or inhuman" which were the additional words found in the statute. Holton v. State, supra, 253 S.E.2d at 740.

Petitioner, in the formulation of his third Question Presented also alleged an overbroad construction of the term "agency" in the aggravating circumstance found in § 565.012.2(6), RSMo 1978. This question should not be considered by this Court because there was no argument presented on this point to the Supreme Court of Missouri and, therefore, there was no ruling on it. Tacon v. Arizona, 410 U.S. 351, 352, 93 S.Ct. 998, 35 L.Ed.2d 346 (1973). That portion of petitioner's brief which presented the "overbroad" challenge is contained in Appendix A, attached hereon. Furthermore, there is no argument presented in the argument portion of the petition for writ of certiorari concerning this issue.

The petitioner also raises the issue about whether or not a death penalty can be sustained if one of the several aggravating circumstances upon which it is based is found to be constitutionally infirm. This issue also should not be reviewed by this Court because the Supreme Court of Missouri made no holding concerning it. At the most, the Supreme Court simply "noted" that jurisdictions were split on the proposition that death penalties could be upheld as long as one of several aggravating circumstances were found to pass constitutional muster. See page 14, n. 5 of slip opinion. The Missouri court's decision must have clearly turned on the federal question in order for it to be subject to review. Simmons v. West Haven Housing Authority, 399 U.S. 510, 512, 90 S.Ct. 1960, 26 L.Ed.2d 764 (1970); Lear v. Adkins, 395 U.S. 653, 675-676, 89 S.Ct. 1902, 23 L.Ed.2d 610 (1969).

CONCLUSION

WHEREFORE, respondent requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 4 day of September, 1981, to:

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